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In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-669

ELLSWORTH FREIGHT LINES INC., et al.,
Appellants,

vs.

MISSOURI HIGHWAY RECIPROCITY COMMISSION, et al.,
Respondents.

On Appeal from the Supreme Court of the State of Missouri

Reply Brief in Opposition to Motion to Dismiss or Affirm and in Support of Jurisdictional Statement

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INDEX

	Page
Statement of the Case	1
The Federal Questions Are Substantial	4
A. The Missouri Reciprocity Commission Violated the United States Constitution and the Uniform Compact, Thereby Giving Rise to Substantial Federal Claims	4
1. The Actions of the Reciprocity Commission Unconstitutionally Burdened Interstate Commerce	5
2. The Actions of the Commission Violated the Equal Protection Clause of the Fourteenth Amendment	7
3. The Action of the Commission Violated the Privileges and Immunities of Citizens of Other States Forbidden by Art. IV, § 2 of the Constitution	8
4. The Actions of the Commission Violated the Due Process Clause of the Fourteenth Amendment	8
5. The Actions of the Commission Contravene the Constitutional Prohibition Against Impairing the Obligation of Contract	9
6. The Violation by the Missouri Highway Commission of the Uniform Compact Gives Rise to Federal Rights and the Waiver of Sovereign Immunity	10
B. The Ruling of the Missouri Supreme Court Raises Substantial Federal Questions	13
Conclusion	15

TABLE OF AUTHORITIES

Pages

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977) 5

Delaware, Lakawanna and Western R. Co. v. Kingsley, 189 F. Supp. 39 (1960) 7

General Motors v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed. 430, (1963) Reh. Den. 379 U.S. 875 7

In Ladue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District, 433 F.2d 131 (8th Cir. 1970) 11

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 St. Ct. 396, 98 L.Ed. 583 (1954) 7

Mullaney v. Anderson, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed.2d 458 (1951) 5

National Bellas Hess v. Department of Revenue, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1966) 8

Norfolk & Western R. Co. v. Missouri State Tax Commission, 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201, Reh. Den. 390 U.S. 1046 (1968) 6

Northwest Airlines v. Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 283 (1944) 7

Parden v. Terminal Railway of the Alabama State Docks Department, 377 U.S. 184, 84 S. Ct. 1207, 12 L.Ed.2d 233 (1964) 11, 12

Petty v. Tennessee Missouri Bridge Commission, 359 U.S. 275, 79 S. Ct. 785, 3 L.Ed.2d 804 (1958) 10, 11, 12

Sunday Lake Iron Co. v. Township of Wakefield, (1918) 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154 7

Pages

Toomer v. Witsell, 334 U.S. 385, 68 S. Ct. 1156, 92 L.Ed.2d 1460 (1947) 8

United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) 9, 10

Weissinger v. Boswell, (1971) 330 F.Supp. 615 7

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STATEMENT OF THE CASE

The primary argument of the Motion to Dismiss or Affirm is that there are no Federal claims or rights involved in this litigation and hence Missouri may invoke § 136.035 by reason of the doctrine of sovereign immunity. In initial response thereto, the following undisputed factual aspects of this case should be emphasized.

1. The action filed by appellants before the Circuit Court of Cole County, Missouri, on October 26, 1970,

clearly alleged various violations of the Federal Constitution as well as the Uniform Compact. After a trial in which there was no dispute concerning the retalitory practices of the Missouri Commission, the Trial court held that these practices—the Compact Miles Formula, the Gulick Gimmick, and Special Deals —not only violated the Uniform Compact but also resulted in arbitrary discrimination between different categories of carriers, multiple taxation, discrimination between instate and out-of-state carriers, and the levying of fees which bore no reasonable relationship to the use of the highways. (See Appendix A to the Jurisdictional Statement, pp. 2-4 and 7.) This case thus involves far more than a mere deviation from the Uniform Compact formula. These practices were held by the Circuit Court to violate the United States Constitution by imposing unreasonable burdens on interstate commerce, denials of the privileges and immunities of citizenship, violation of due process, denial of equal protection of the laws, and contravention of the constitutional prohibition against impairing the obligation of contract. (Appendix A to Jurisdictional Statement, pp. 6-7). That the Circuit Court was correct in ruling that these practices created Federal Claims for Relief is discussed in detail below. The Missouri Supreme Court did not rule on the substantive validity of the Federal Claims, Rather, it ordered the dismissal of all such claims by forcing the case to be heard by an administrative agency which had no authority to hear federal or constitutional matters.

2. The Circuit Court specifically found, based on credible testimony, that in 1967 the Missouri Highway Commission misrepresented to the carriers that if Iowa was forced to refund money to Missouri carriers, Missouri would refund without the necessity of filing litigation. (Appendix A to Jurisdictional Statement, p. 4) The arguments to the contrary, cited in

the Motion to Dismiss or Affirm at p. 14, were rejected by the Circuit Court. The Missouri Supreme Court did not alter this finding.

3. Two judges of the Missouri Circuit Court held this action to be a proper class action within both the Federal and Missouri Class Action Rules, which parallel Federal Rule of Civil Procedure Twenty-three. The suggestion at page 5 of the Motion to Dismiss or Affirm that the named plaintiffs are not representative of the class was thus rejected by the only court to consider the matter (Appendix A to Jurisdictional Statement, pp. 5 and 6).

4. The assertions in the Motion to Dismiss or Affirm (p. 14) that there was no evidence of stalling the administrative process and that appellants "abandoned" their administrative approach are an astounding mischaracterization of the record. As shown by the specific finding of the circuit court, appellants took every step to protect their administrative rights. Finding six by that court is as follows:

> "(6) On July 6, 1973, Plaintiffs filed a Petition for Writ of Review (Exhibit 8) and thereupon received from representatives of the State Tax Commission a letter stating that the matter would be set for a hearing and plaintiffs would be notified. (Plaintiffs' Exhibit 7) As of the date of the trial hereof, December 1975, no further administrative action had been taken."

The court then concluded that "the six years of administrative delay in this action have resulted in the misuse of administrative proceedings" (See p. 7 in Appendix A to Jurisdictional Statement.)

5. The representations on page 4 of the Motion to Dismiss that the appellants have taken no steps to perfect their administrative appeals and that no decision of the Missouri State Tax Commission has been rendered are both untrue. The appeals, as shown by

the foregoing paragraph, were perfected in July, 1973. The decision of the State Tax Commission based on the perfected appeal was finally entered on December 19, 1978, almost three weeks before the Motion to Dismiss or Affirm was filed with this court. The complete text of the administrative decision is attached to this Reply Brief as Appendix A.

As predicted in the Jurisdiction Statement, the administrative ruling does the following:

a. The Federal claims were not heard or decided as a matter of substantive law. Rather, such claims were declared defeated by the provision of Section 136.035 R.S. Mo. because the state had not "consented" to being sued.

b. No class action claims were allowed because this action is a claim against the state, although the Federal and Missouri laws on claims other than against the state is to the contrary. Moreover, the filing of class action claims was held not to toll the statute of limitations, notwithstanding contrary Federal law.

c. There is no interest payable on the monies illegally collected by the state ten years earlier, although Federal law provides for the payment of interest on Federal Claims.

In brief, the administrative agency refused to consider the application of Federal law to the Federal Claims because of the state's asserted sovereign immunity.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. The Missouri Reciprocity Commission Violated the United States Constitution and the Uniform Compact, Thereby Giving Rise to Substantial Federal Claims.

Because the Missouri Highway Commission's contentions rest on the premise that there are no valid Federal claims involved herein, we shall review the legal basis of such

claims as found by the trial court. Then we shall turn to the consequences of defeating or impairing such claims by the state rules of procedure.

1. THE ACTIONS OF THE RECIPROCITY COMMISSION UNCONSTITUTIONALLY BURDENED INTERSTATE COMMERCE.

The application of the Compact Miles Formula, Gulick Gimmick and special allocation deals resulted in arbitrary tax or license rates for different classes of truck owners and resulted in discrimination based on state of residence and size of operation. (Tr. 144-146) It is well settled that a tax or license fee which has the effect of unreasonable discrimination between domestic and interstate businesses by providing an advantage to the domestic business is an unconstitutional burden on interstate commerce. The U. S. Supreme Court so held in *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514, (1977).

> "No state may, consistent with the Commerce Clause, impose a tax which discriminates against individual commerce . . . by providing a direct commercial advantage to local business. (cites) The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the clause. Permitting the individual states to enact laws that favor local enterprises at the expense of out-of-state businesses would invite a multiplication of preferential trade areas destructive of the free trade the clause protects."

See also:

Mullaney v. Anderson, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed.2d 458 (1951).

(Higher fees to non-residents invalid unless difference bears some relationship to increased costs resulting from out of state nature of business.)

In *Norfolk & Western R. Co. v. Missouri State Tax Commission,* 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201, Reh. Den. 390 U.S. 1046, (1968) this court considered utilization of a mileage formula to assess taxes on interstate train cars. In finding the mileage formula unconstitutional the court held:

> "A state will not be permitted, under the shelter of an imprecise allocation formula . . . to project the taxing power of the state plainly beyond its borders . . . Any formula used must bear a rational relationship, both in its face and its application, to property values connected with the taxing states . . . We repeat that it is not necessary that a State demonstrate that its use of the mileage formula has resulted in an exact measure of value. But when a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in its particular case, the state is obliged to counter that evidence . . . If it fails to do so and if the record shows that the taxpayer has sustained the burden of proof to show that the tax is so excessive as to burden interstate commerce, the taxpayer must prevail."

It is clear from the above review of Federal and Missouri law that a discriminatory taxing scheme as found by the trial court to exist in this case violates the U.S. Constitution by imposing a burden on interstate commerce.

The Missouri Circuit Court found the application of Compact Miles Formula and the Gulick Gimmick imposes multiple taxation on a large number of the carriers. (Tr. 145) It is well settled that multiple taxation is an unconstitutional burden on interstate commerce. "We, [the United States Supreme Court], have specifically held that interstate commerce cannot be subjected to the burden of 'multiple taxation'." *General Motors v. Washington,* 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed. 430, (1963) Reh. Den. 379 U.S. 875.

See also:

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 St. Ct. 396, 98 L.Ed. 583 (1954); *Northwest Airlines v. Minnesota,* 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 283 (1944).

2. THE ACTIONS OF THE COMMISSION VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Missouri trial court in finding a violation of equal protection again applied well settled law. "Intentional discrimination and unfair assessment is a violation of federal constitutional rights." *Delaware, Lakawanna and Western R. Co. v. Kingsley,* 189 F. Supp. 39 (1960).

See also:

Sunday Lake Iron Co. v. Township of Wakefield, (1918) 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed 1154 (The Fourteenth Amendment "secure(s) every person . . . against intentional and arbitrary discrimination".)

Weissinger v. Boswell, (1971) 330 F.Supp. 615 ("The Fourteenth Amendment protects . . . against taxation which is palpably arbitrary or grossly unequal in its application.")

In the instant case, the court found that the effect of the application of different tax and license rates to different groups of truckers resulted in arbitrary and unequal application of license fees. (Tr. 144-146) As seen above, this arbitrary and discriminatory practice violates Fourteenth Amendment equal protection guarantees.

3. THE ACTION OF THE COMMISSION VIOLATED THE PRIVILEGES AND IMMUNITIES OF CITIZENS OF OTHER STATES FORBIDDEN BY ART. IV, § 2 OF THE CONSTITUTION.

The trial court found that the discriminatory fee practices of the Commission violated the privileges and immunities guaranteed by the U.S. Constitution. (Tr. 146) Here, again, the trial court was resting on well settled law. In *Toomer v. Witsell,* 334 U.S. 385, 68 S. Ct. 1156, 92 L.Ed.2d 1460 (1947), the court considered the validity of a license fee structure which discriminates between resident and nonresident fishermen. The court noted that the provision is not absolute but, "It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. . . . [T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." (334 U.S. at 396)

In the instant case the court found the reason for discrimination was precisely that the carriers were citizens of other states. (Tr. 144) The state never offered any other reason for such discrimination. The trial court correctly reasoned that the discrimination violated the privileges and immunities guaranteed by the Constitution.

4. THE ACTIONS OF THE COMMISSION VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The trial court found that the practice of discriminating in assessing license fees violated due process. (Tr. 146) The test for determining whether a State tax falls within the confines of the Due Process Clause is "the simple but controlling question (of) whether the state has given anything for which it can ask return." *National Bellas Hess v. Department of Revenue,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1966). In the instant case the state offered no

explanation as to why certain carriers should be taxed at a higher rate than others. It offered no showing of the state giving anything special to them. Here again, the trial court was correct in its application of the law on the subject.

5. THE ACTIONS OF THE COMMISSION CONTRAVENE THE CONSTITUTIONAL PROHIBITION AGAINST IMPAIRING THE OBLIGATION OF CONTRACT.

The Commission entered into the Uniform Compact in an effort to avoid unreasonable burdens on interstate commerce, to provide uniform standards for fee structures and to eliminate the concept of residency or "basing points" as a determinant of fees. In addition the Commission bound the State in the future exercise of its taxing powers by fixing a uniform standard for fees. (Tr. 134, 144) The trial court held the use of the Compact Miles Formula and Gulick Gimmick to be a breach of the compact and unauthorized, invalid and unlawful as it impaired the obligations of the contract. (Tr. 149, 150)

States can bind themselves in the future exercise of their taxing and spending powers. *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 97 S. Ct. 1505, 52 L.Ed.2d 92 (1977). After so doing they may not impair their contractual obligations unless "that impairment was both reasonable and necessary to serve . . . important purposes claimed by the State." (97 S.Ct. at 1519).

The Court in *U.S. Trust,* held the test of necessity to be twofold. First, a less drastic modification of the obligation will not achieve the State's purposes. Second, no alternative means of achieving the State's goals could be applied. In holding that the States of New Jersey and New York could not repeal or impair an interstate compact between them the court found that the States had not met the burden of the two-part test.

In the instant case, as in *U.S. Trust,* the State is attempting to alter its obligations under the interstate compact. Here, as in *U.S. Trust,* the state has not offered any showing that such impairment of the contract was "both reasonable and necessary to serve . . . important purposes." Thus, the trial court correctly applied the law relating to impairment of contract in this case.

6. THE VIOLATION BY THE MISSOURI HIGHWAY COMMISSION OF THE UNIFORM COMPACT GIVES RISE TO FEDERAL RIGHTS AND THE WAIVER OF SOVEREIGN IMMUNITY.

All parties concede the violation of the Uniform Compact by the Commission. The Commission then attempts to reduce the case solely to a "mere deviation" from the Compact and then to argue by application of Missouri law that there was no waiver of sovereign immunity by entering the compact. Both contentions are erroneous.

As discussed above, this action is not founded solely on violations of the Uniform Compact. The multiple tax burdens, discrimination between carriers, and arbitrary formulas give rise to various federal constitutional claims for relief, any one of which justifies a damage recovery to which sovereign immunity is no defense.

As a separate and alternative claim for relief, the violation of the Uniform Compact gives rise to "federal" claims, to which sovereign immunity is not a defense.

By signing the Uniform Proration and Registration Compact, the State of Missouri entered into interstate relationships and interstate commerce which are subject to the regulation and control of the federal government. It has long been held that all such interstate agreements (including any defenses thereto) and state activities within the area of interstate commerce are governed by federal, not state law. In *Petty v. Tennessee Missouri Bridge Commission,*

359 U.S. 275, 79 S. Ct. 785, 3 L.Ed.2d 804 (1958), the administrator of the estate of a deceased ferryboat employee brought suit against the bridge commission in federal court in Missouri, alleging negligence under the Jones Act. The district court dismissed the suit, holding that the bridge commission was an agency of Missouri and Tennessee and therefore immune from suit in tort under the doctrine of sovereign immunity. 153 F.Supp. 512; *aff'd.* 254 F.2d 857. This Court reversed on the ground that the states' entry into the interstate compact operated as a waiver of sovereign immunity. Although Missouri law clearly provided that the commission was immune from suits for negligence, the Supreme Court held that the question of waiver is one of federal, not state.

Moreover, this Court extended its *Petty* holding in *Parden v. Terminal Railway of the Alabama State Docks Department,* 377 U.S. 184, 84 S. Ct. 1207, 12 L.Ed.2d 233 (1964). In that case, the question was whether the defense of sovereign immunity was available to a state-owned railroad sued in federal court by an employee under the Federal Employer's Liability Act. The Supreme Court held that when a state enters a sphere subject to congressional regulation, such as interstate commerce, it impliedly waives its sovereign immunity and consents to suit.

The Petty and Parden cases have been uniformly followed and applied by lower federal courts. In *Ladue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District,* 433 F.2d 131 (8th Cir. 1970), the court held that a bi-state agreement between Missouri and Illinois had the following effect:

> "As in *Petty,* we think it clear that the entry of the two states into the compact in the present case manifests a consent of the states that bi-state [agreements]

be subject to the jurisdiction of the federal authority governing 'commerce between the states.' "

The lower Missouri court rejected the Highway Commission's attempt to distinguish *Petty v. Tennessee Bridge Commission, supra,* on the ground that the compact in that case had express congressional approval and the right to sue or be sued was set forth in the agreement. Although *Petty* involved an interstate compact which had congressional approval, the fact of congressional approval was not mentioned as an essential element of the case. Indeed there are a number of situations in which the compacts do not require congressional approval and yet are valid under the U.S. Constitution. Nor did the case turn on whether the compact provided for a right to sue and be sued. An examination of the opinion discloses that the compact in question did contain such a clause, but it was read by the Missouri courts as not involving a waiver of sovereign immunity. The court emphasized that federal law governs and that if interstate compacts are to have the uses so essential to modern federalism, the doctrine of sovereign immunity cannot be held to apply or such compacts become unenforceable and worthless.

Likewise, *Parden v. Terminal Railway of the Alabama State Docks Department, supra,* did not involve an interstate compact in which Congress, as part of its exercise of the constitutional power to regulate commerce, had attached a condition of amendability to sue. To the contrary, there was nothing in any compact specifically providing whether the state could sue or be sued. The court, looking at the state's intrusion into the area of interstate commerce and to subsequent federal legislation unrelated to any interstate compact, concluded that the use of the doctrine of sovereign immunity could not be permitted.*

For the foregoing reasons, there are multiple Federal Claims in this case, any one of which could form a basis for recovery. This is not an action based merely on entry unto and violations of the Uniform Compact, although such violations alone give rise to valid Federal claims.

B. The Ruling of the Missouri Supreme Court Raises Substantial Federal Questions.

Once the existence of substantial Federal claims in this action is acknowledged, the Motion to Dismiss or Affirm is shown to be without substance. No attempt is made in the Motion to Dismiss or Affirm to dispute the proposition that there is no sovereign immunity protecting a state against claims based on Federal Constitutional violations. Nor does the State attempt to meet or distinguish the authority establishing that the State may not qualify or condition Federal rights by local rules of practice. Yet, the dismissal of federal constitutional claims by the Missouri Supreme Court is clearly a conditioning of Federal rights based on sovereign immunity.

The order of the Missouri Supreme Court and State Tax Commission thus raises substantial Federal questions as follows:

1. The Federal Constitutional and Interstate Compact claims of several thousand trucking firms have been dismissed based on alleged state sovereign immunity. Such a holding drastically impairs the asser-

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**Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), relied upon by the appellees, merely refused to extend the Petty and Parden cases to a situation in which there was no interstate compact and no participation in interstate commerce by the state involved. In short, the Supreme Court refused to rule that the mere acceptance of federal matching funds caused the loss of sovereign immunity.

tion of all Federal claims against states and affects the significance and development of Interstate Compacts.

2. The Missouri Supreme Court and State Tax Commission refusal to apply Federal law is in conflict with substantial authority of this court.

3. By ordering the dismissal of the Federal constitutional claims and the referral to the State Tax Commission which cannot consider such claims, the Missouri Courts have conditioned, impaired and defeated Federal rights and provided a precedent for the defeating of other Federal rights when asserted against a state.

4. Federal law should govern these claims, particularly when the state law applicable to lawsuits generally is not in conflict therewith. In other words, the state should not be permitted to enact special requirements and limitations on Federal claims against it based on sovereign immunity. Accordingly the following should occur.

a. The Federal law on class actions (with which general Missouri law is in agreement) should govern the case. The class action based on Federal claims cannot be defeated simply because class action claims are not permitted against the state because of doctrines of sovereign immunity. In the alternative, the Federal law on the tolling of actions by the filing of class claims must be applied.

b. The Federal law relating to misrepresentations and estoppel to plead the statute of limitations should be applied to Federal claims against a state. State misrepresentations affecting Federal rights cannot be defeated by assertion of sovereign immunity.

c. Federal law governing interest on Federal claims is likewise controlling and cannot be denied by a state asserting sovereign immunity, particularly when the state authorities have stalled the proceedings to prevent payment of damages and interest.

d. The five year statute of limitations (§ 516.120 R.S. Mo. 1969) which governs constitutional claims generally should control the action by reason of its incorporation under Federal law. The state by asserting sovereign immunity may not limit Federal claims against the state to a two year period of limitations.

5. Because of its misrepresentations and stalling occurring over a period of nine years, a state should not be permitted to defeat or diminish Federal claims by requiring exhaustion of administrative remedies.

The ruling of the Missouri Supreme Court is contrary to the law and equities. If allowed to stand it will defeat the substantial federal rights of the trucking industry and will be a precedent to defeat or diminish other Federal claims against states.

CONCLUSION

For the reasons noted above, the questions presented are substantial. Jurisdiction should be noted and the ruling of the Missouri Supreme Court should be reversed with instructions that Federal law relating to class actions, limitations, and interest must be applied.

Respectfully submitted,

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Appendix A

State Tax Commission of Missouri

Appeal Number 1973-16

Ellsworth Freight Lines, Inc.,
Hirschbach Motor Lines, Inc.,
Kroblin Refrigerated Xpress, Inc.,

Complainants,

vs

Gerald Goldberg, Director of Revenue
for the State of Missouri,

Respondent.

DECISION AND ORDER

I. FINDINGS OF FACT

The State Tax Commission of Missouri, having considered all of the competent evidence upon the whole record, makes the following Findings of Fact:

1.1 Complainants in the above-numbered appeal are Ellsworth Freight Lines, Inc., Hirschbach Motor Lines, Inc. and Kroblin Refrigerated Xpress, Inc.

1.2 The Respondent in the above-numbered appeal is Gerald Goldberg, in his official capacity as Director of Revenue for the State of Missouri.

1.3 Complainants are common carriers of general commodities engaged in the business of transporting such commodities in interstate commerce in the State of Missouri and in other states and as such are the owners or lessees of fleets of two or more commercial vehicles engaged in such commerce.

1.4 On or about December 16, 1969, Complainants herein, "individually and on behalf of all trucking companies similarly situated," filed a petition for refund of allegedly overpaid highway registration and licensing taxes. On June 12, 1970, Complainants filed additional requests for refunds with Respondent.

1.5 By letter dated June 6, 1973, the Director of Revenue denied Complainants' claim for refund of license fees.

1.6 On July 2, 1973, Complainants timely filed a petition with the State Tax Commission to review the above order of the Director of Revenue denying the claims for refund.

1.7 Prior to this appeal, on October 26, 1970, Complainants on behalf of themselves and others similarly situated instituted an action in the Cole County Circuit Court against the Missouri Highway Reciprocity Commission, among others.

> "Count one sought a declaratory judgment that certain practices, rules and regulations of the Missouri Highway Reciprocity Commission concerning the collection of motor vehicle registration fees were unconstitutional; Count two sought injunctive relief against those practices; Count three sought recovery of registration fees allegedly collected illegally by the Commission since 1960, along with interest; and, Count four requested mandamus against the Director of Revenue, the Treasurer and the Controller for payment of the alleged excessive registration fees." Ellsworth Freight Lines, Inc., et al., v. Missouri Highway Reciprocity Commission, et al., Supreme Court of Missouri, en banc, No. 59981, July 24, 1978. (Slip Opinion).

Defendants [including Respondent] alleged that Plaintiffs [including Complainants] failed to exhaust administrative remedies. Complainants were successful at the trial court level, but on appeal the Supreme Court of Missouri reversed the trial court judgment in holding that Plaintiffs [Complainants] were required to proceed under the tax refund statute, Section 136.035, RSMo 1969, and could not proceed in circuit court and ignore the administrative remedies which have been provided for by statute. Ellsworth Freight Lines, supra, at pp. 4-5.

1.8 Thereafter, a hearing was scheduled for the above-numbered appeal by the State Tax Commission to review the original order of the Director of Revenue denying the refund claims. The Commission was subsequently notified by the parties that they wished to waive hearing on the matter and in lieu thereof submit the case on a stipulation and certain documents attached as exhibits.

1.9 This stipulation states in part as follows:

> "8. [Complainants] request a ruling from this Commission that an appeal on behalf of themselves and all other trucking firms in the class they purport to represent is proper, and that the alleged Federal Constitutional and Interstate Compact claims for alleged overcharges in highway registration fees cannot be limited by the two-year statute of limitation of Section 136.035 RSMo. [Complainants] contend in the alternative that any statute of limitations must be tolled by the filing of the class action claims or by doctrines of estoppel. [Complainants] further contend that they are entitled to interest on the alleged overcharges....
>
> "9. Based upon the Missouri Supreme Court decision of *State ex rel. Brady Motor Frate, Inc. v. State Tax Commission,* 517 S.W.2d 133 (Mo. 1974), the [Respondent] concedes that the application of the "compact mile" formula to highway registration fees assessed against the [Complainants] was improper, but maintains that class actions for refund of taxes collected illegally are not allowed in the State of Missouri, and that Section 136.035, RSMo, the applicable section for recovery of taxes allegedly paid illegally, sets forth a two year statute of limitations which must be applied in this case. [Respondent] denies liability to any trucking company other than the three named [Complainants]; he further denies a liability to the three named [Complainants] for any payments made before December 16, 1967, two years before the date of the filing of the initial refund affidavit...."

1.10. The compact mile formula compares miles traveled in Missouri to miles traveled in the compact states under the reciprocity agreement. The fleet mile formula results in a ratio of miles traveled in Missouri to total miles traveled.

1.11 No evidence was presented to this Commission indicating in any way that Respondent made promises which served to induce delay on the part of Complainants in filing a tax refund action under Section 136.035.

1.12 On the 15th day of December , 1978 the Commission convened in a public meeting after due notice to consider and rule upon the said appeal.

II. CONCLUSIONS OF LAW

The State Tax Commission of Missouri finds the law as it applies to this appeal to be as follows:

2.1 The Commission has jurisdiction to decide this appeal. Section 138.430(1), RSMo 1969 (hereinafter by section only).

2.2 Highway registration fees are imposed for the privilege of using the highways in this state and are quite properly considered as a tax. Transport Rentals, Inc. v. Carpenter, 325 S.W.2d 745, 749 (Mo. 1959).

2.3 When a state consents to be sued, it may be sued only in the manner and to the extent provided by statute; and the state may prescribe the procedure to be followed and such other terms and conditions as it sees fit. Charles v. Spradling, 524 S.W.2d 820, 823 (Mo. banc 1975); Gas Service Co. v. Morris, 353 S.W.2d 645, 655 (Mo. 1962).

2.4 The refund procedures outlined in Section 136.035, RSMo 1969, designed to allow recovery of illegally exacted or collected taxes, are the exclusive and mandatory means of recovery, including the time limitation contained therein. Charles v. Spradling, 524 S.W.2d 820, 823 (Mo. banc 1975); International Business Machines Corp. v. State Tax Commission, 362 S.W.2d 635, 640 (Mo. 1962). A taxpayer is entitled to a refund of overpaid taxes only to the extent that he has complied with these procedural requirements. State ex. rel. Brady Motor Frate, Inc. v. State Tax Commission, 517 S.W.2d 133, 137-138 (Mo. 1974).

2.5 Section 136.035(3) provides as follows:

> "No refund shall be made by the Director of Revenue unless a claim for refund has been filed with him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded."

This two year statute of limitation restricts a taxpayers right of recovery for improperly assessed highway registration fees in a refund case filed pursuant to Section 136.035. State ex. rel. Brady Motor Frate, Inc. v. State Tax Commission, 517 S.W.2d 133, 137-138 (Mo. 1974).

2.6 The vehicle registration proration reciprocity agreement entered into by the Missouri Highway Reciprocity Commission with several other states in November of 1959 mandates use of the fleet mile formula of prorating registration fees. Under this agreement, use of the "compact mile formula" is improper. State ex rel. Brady Motor Frate, Inc. v. State Tax Commission, 517 S.W.2d 133 (Mo. 1974).

2.7 Under Missouri law, there can be no class action claims for tax refunds where such class action claims are not specifically provided for by statute. Charles v. Spradling, 524 S.W.2d 820, 823 (Mo. banc 1975). Further, the filing of a purported class action claim does not serve to toll the statute of limitations prescribed in a tax refund statute.

2.8 Interest eo nomine is a creature of statute. This is particularly true in its application to liabilities of the state

and its government agencies. Simmons Hardware Co. v. City of St. Louis, 192 S.W. 394, 398 (Mo. 1917); International Business Machines Corp. v. State Tax Commission 362 S.W.2d 635, 641 (Mo. 1962).

III. DECISIONS

The State Tax Commission of Missouri, being fully advised in the matters and upon full consideration thereof, makes the following decisions in this appeal:

3.1 The Commission feels that the major issues in this case are controlled by the rulings in Charles v. Spradling, supra; State ex rel. Brady Motor Frate, Inc. v. State Tax Commission, supra; and, International Business Machines, Corp. v. State Tax Commission, supra. These cases stand for the proposition that when the legislature places conditions and limitations upon the right of a taxpayer to sue the state and, specifically, to obtain a refund of overpaid taxes, these conditions and limitations must be strictly met. In this case, it is clear that the law of Missouri precludes recovery of any overpaid taxes upon which payment was made prior to December 16, 1967, two years before the date of the filing of the initial refund affidavit. Furthermore, it is clear that under Missouri law class action cases are not permissible in tax refund actions. The Commission also concludes that the time limitation set forth in Section 136.035 may not be tolled by the filing of the class action in the instant case or by any doctrine of estoppel. As previously noted, there are absolutely no facts which have been presented to this Commission which indicate that the State in any way induced delay on the part of Complainants in filing any refund action.

Complainants further assert that they are entitled to interest on the alleged overcharges. The Commission disagrees. The Commission feels that in the absence of a specific statute granting the right to interest for alleged overpayments in an action filed pursuant to Section 136.035 that such interest is not obtainable in such an action. International Business Machines Corp. v. State Tax Commission, supra, at 641.

Thus, it appears that Respondent's liability is limited to the three named Complainants and liabiiity is further limited to tax payments made after December 16, 1967.

Under the case of State ex rel. Brady Motor Frate, Inc. v. State Tax Commission, supra, Respondent is liable for any payments of taxes made by the three named Complainants after December 16, 1967, which were based upon the compact mile formula. Respondent's liability can be ascertained by determining Complainants' liability under the fleet mile formula and subtracting that sum from Complainants' purported liability under the compact mile formula.

By stipulation of the parties, the State Tax Commission accepts as correct the dollar amounts claimed as overpayments tor the years in question, as stated in certain exhibits attached to the stitpulation submitted to the Commission. By this stipulation, Respondent is liable to Complainant Ellsworth Freight Line for overpaid taxes for the tax year 1968 in the amount of $2,911. Respondent is liable to Complainant Hirschbach Motor Lines, Inc. in the amount of $19,616.43 on the 1968 tax year and $21,194.92 for the tax year 1969. Respondent's liability to Complainant Kroblin Refrigerator Xpress, Inc. is defeated by the two year limitation of Section 136.035.

IV. ORDER

Based upon the aforegoing, it is hereby ORDERED, ADJUDGED AND DECREED by the State Tax Commission of Missouri as follows:

4.1 The Order of the Director of Revenue, issued June 6, 1973, denying Complainants claim for refund of license fees, is hereby AFFIRMED in part and REVERSED in part.

4.2 The case is REMANDED to the Director of Revenue for proceedings consistent with this Decision and Order.

4.3 The Administrative Secretary of the Commission shall serve a certified copy of this Decision and Order on each party to this appeal.

4.4 This Decision and Order shall become effective on the 19th day of December 1978.

STATE TAX COMMISSION OF MISSOURI

/s/ Tom R. Otto
Chairman

/s/ .....
Commissioner

/s/ ..... Seal
Commissioner

Dated at Jefferson City, Missouri,
On this 19 day of December, 1978.

State Tax Commission of Missouri

CERTIFICATION

I, ROBERT COLEMAN, being the duly appointed Administrative Secretary of the State Tax Commission of Missouri, hereby certify the aforegoing Decision and Order to be a true copy of the proceedings of said Commission as the same appears on record in my office, and further certify that a true copy of the aforegoing has been personally delivered or mailed postage prepaid to the following:

John Inglish, Esquire
222A Madison
Jefferson City, Missouri 65101

Richard L. Wieler,
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65102

William Harrelson, Esquire
Assistant General Counsel
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65102

WITNESS MY HAND AND THE SEAL OF SAID COMMISSION ON THIS 19th DAY OF DECEMBER, 1978.

By Robert Coleman
Administrative Secretary